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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 222

EDWARD JOHN NOWAKOWSKI,

Petitioner,

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

The orders of the court of appeals (R. 135, 140) are not reported. The opinion of the district court upon the petition for writ of habeas corpus appears in the record at R. 115.

Jurisdiction

The order of the court of appeals was entered on October 4, 1965 (R. 140). A petition for a writ of certiorari was filed on January 4, 1966, and was granted on June 13, 1966 (R. 141; —— U.S. ——). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether on application for leave to appeal in forma pauperis, the court of appeals without examining any legal memoranda by appointed counsel could deny an indigent criminal defendant the right to proceed in forma pauperis and the right to counsel, at a stage when a non-indigent litigant's appeal would not be similarly dismissed.

2. Whether the court of appeals abused the discretion vested in it under Section 1915 of Title 28 U.S.C. when it denied leave to appeal in forma pauperis to an indigent criminal defendant after the trial judge had issued a certificate of probable cause.

3. Whether the questions presented in the collateral attack proceedings were so frivolous as to justify a dismissal of the proceedings without the appointment of counsel and without a hearing.

Statute Involved

Section 1915 of Title 28 U.S.C. provides in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, ac-

tion or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. Any appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Statement

I. The State Court Proceedings.

In the early morning hours of July 13, 1957, the Green Garden Tavern in Erie, Pennsylvania was broken into and the contents of a pin ball machine, pool table and two cigarette machines, together with a small cash register, $60.00 cash from the register and $10.00 from the cash box were removed from the premises. (R. 33) On the same day three suspects were arrested and charged with the crime. Two of the men, Douglas E. Smith and Joseph Corcoran pleaded guilty to the charges. (R. 30) The defendant Edward John Nowakowski, the petitioner in this court, pleaded not guilty. (R. 31)

A preliminary hearing was held in the Alderman's Court on July 18, 1957 and the defendant Smith gave evidence against the petitioner alleging that the petitioner Nowakowski had been an accomplice in the robbery in the Green Garden Tavern. (R. 31) All three defendants were held for the grand jury and on August 28, 1957, the grand jury of Erie County returned an indictment against all three defendants charging them with burglary, larceny and receiving stolen goods. (R. 35)

On September 11, 1957, the petitioner was arraigned by the Erie County Criminal Court of Quarter Sessions and pleaded not guilty to the indictment. (R. 35) On the same day the Commonwealth proceeded to trial against the petitioner. The records of the Clerk of the Court annexed to petitioner's brief (App. 32) indicated that an appearance was entered in his behalf by a court appointed counsel Thomas C. Mangan, Esq. on the same date of September 11, 1966. The original docket for the court shows that on

the preceding day the co-defendant Douglas E. Smith had pleaded guilty to the indictment and was awaiting sentence. (App. 34). The third defendant, Corcoran was 16 at the time of the crime and no record appears of the disposition of his case. He was presumably treated as a juvenile.

The principal defense of the petitioner Nowakowski in the state court proceeding was an alibi—that he had been in the presence of one Joan Logan Servido during the hours of 3:00 A.M. to 6:00 A.M. on the morning when the crime was committed. (R. 106) His court appointed counsel failed or was unable to produce this witness at the time of trial. (R. 81) The alleged co-perpetrator Douglas Smith, when called upon to testify for the State, testified that neither he nor Nowakowski had any part in the burglary or the crime at the Green Garden Tavern. (R. 61) Thereupon, without objection, the Commonwealth was permitted to impeach Smith by reading to the jury the prior statement which he had made in the Alderman's Court. (R. 66) However, no cautionary instructions were given to the jury that the evidence with respect to the prior statement was for impeachment purposes only and could not be used as direct evidence of guilt. (R. 72) Following the trial by jury a verdict of guilty was entered on September 12, 1957. Prior to sentencing the petitioner escaped from the Erie County Jail but he was subsequently apprehended and sentenced to four to ten years on account of the prison breach and was sentenced to three to seven years on the indictment charging burglary, larceny and receiving stolen goods.

II. The Habeas Corpus Hearing.

After having exhausted all of his state remedies, (R. 50) petitioner made application in forma pauperis for a writ

of habeas corpus to the United States District Court for the Western District of Pennsylvania. By an amendment to the petition filed January 6, 1965, the allegations of the petition were narrowed to specify that petitioner was unfairly denied the aid and assistance of counsel as required by the Sixth and Fourteenth Amendments of the United States Constitution in that (1) his court appointed counsel, Thomas C. Mangan did not confer with him until ten or fifteen minutes before the trial and proceeded to try the case with no investigation of witnesses and facts. (2) The failure of his counsel to allow sufficient time to prepare the case resulting in the absence of the alibi witness, Joan Logan Servido. (3) The failure of his counsel to interview Douglas Smith before the trial permitted the District Attorney to bring him before the court and plead surprise at his testimony which would apparently have exculpated the petitioner. (R. 46) A hearing on the application was fixed for Monday, February 8, 1965 and subpoenas were issued for JoAnn Logan and for Thomas C. Mangan, Esq. (R. 48)

At the habeas corpus hearing, Mr. Mangan had little recollection of the trial which had occurred some eight years prior. He recalled that the trial had been interrupted when Douglas Smith had changed his testimony and admitted that Mr. Smith had not been interviewed prior to the trial and that Joan Logan, the alibi witness had not been interviewed prior to the trial. (R. 62, 65)

Mr. Mangan was not definite as to when he was actually appointed, although he said, "I presume that I was appointed at least sometime before Monday the 9th because I had a note to get a subpoena on that Monday. I did presume that it was sometime the week preceding that, or I would have no exact idea of how soon." (R. 71). It was

developed that there was not one objection in the whole trial despite the fact that the record was replete with hearsay testimony and other objectionable evidence and the trial judge did not instruct the jury as required by the laws of Pennsylvania, that the hearsay testimony as to Douglas Smith was for impeachment purposes and not substantive evidence. (R. 72)

The petitioner Nowakowski contended that the first time that he met his court appointed attorney was on the very morning of the trial (R. 78), a fact which was not controverted by Mr. Mangan. Petitioner testified that he then gave the name of his alibi witness to Mr. Mangan and that he (Mr. Mangan) talked with the witness on the telephone and that she was coming down to testify. (R. 80) Reference was made to the transcript of the original trial wherein Mr. Mangan said to the trial Judge late in the afternoon of the first day of trial: "I have a subpoena in my pocket. I was going to take it over to her." (R. 101) so that it appeared that no effort had been actually made to serve Joan Logan Servido until late in the afternoon of the first day of trial.

At the habeas corpus proceeding just as at the original trial, a snag developed as to the production of Joan Logan as a witness. The marshal was unable to serve Joan Logan at the address furnished and returned the subpoena unserved. (R. 90)

After the hearing the district judge concluded that after verifying the record of the trial and the habeas corpus hearing as a whole he was of the opinion that the petitioner had not been denied the effective assistance of counsel and an order to that effect was entered on April 28, 1965. (R. 123) Petitioner through his court appointed attorney,

sought a re-hearing on May 11, 1965, having located Joan Logan Servido at 1310 Shenk Avenue, Erie, Pennsylvania. The court chided the petitioner for failure to give the correct name to his court appointed counsel and said "indeed it was only after prodding by the court, near the end of the habeas corpus hearing that her true surname was brought out in the evidence" (R. 126).

The fact is that the petitioner had expressly referred to his alibi witness as Joan Logan Servido in his amended petition dated January 6, 1965, more than one month before the hearing. (R. 46) Indeed, Judge Marsh's memorandum opinion of January 11, 1965 expressly referred to the petitioner's allegation that because of the ineffectiveness of counsel, "the trial was permitted to proceed in the absence of an important alibi witness, i.e., Mrs. Joan Logan Servido". (R. 50)

A formal order denying the application for a re-hearing was entered on May 14, 1965. (R. 127)

III. The Proceedings on Appeal.

Pursuant to the provisions of 28 U.S.C. 1915 (a) the petitioner applied for a certificate of probable cause to the District Court and on June 15, 1965, the district judge issued the certificate of probable cause. (R. 129) On the same day, petitioner filed Notice of Appeal to the Court of Appeals for the Third Circuit from the order denying his petition for a writ of habeas corpus. (R. 130)

On July 8, 1965, the Pittsburgh attorneys who had represented petitioner in the habeas corpus proceedings asked to withdraw since they did not have "sufficient time to

adequately represent the interests of the [petitioner] in pursuing his appeal before the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania." (R. 131) Their petition was granted on the same day. Thereafter, on July 19, 1957, petitioner, *pro se*, petitioned the Court of Appeals for an order granting him leave to appeal in forma pauperis, that his cause be docketed without the payment of costs or giving of security, that counsel be appointed and that he be given leave to proceed on hand written briefs. Without assigning counsel to petitioner and without hearing him, the Court of Appeals denied his petition. (R. 135) A subsequent petition for rehearing was denied on October 4, 1965 (R. 140). It is from these orders that this appeal is taken.

Policy Involved

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois,* 351 U.S. 12, 19.

Summary of Argument

I.

The denial of leave to proceed in forma pauperis by the court of appeals constituted an invidious discrimination against an indigent defendant. In a long series of cases, commencing with *Griffin* v. *Illinois,* 351 U.S. 12, this court has consistently invalidated any procedure which did not give equal treatment to every litigant before the bar. Had the petitioner had sufficient funds to pay the clerk's filing fee, docket the record and file a brief, his case would have

been heard on the merits as soon after thirty days as the court calendar would permit. As applied by the court of appeals, 28 U.S.C. 1915 has been converted into a method of dismissing appeals of indigents without benefit of counsel, without briefs and without the appellate day in court made available to litigants of means. The statutory right to appeal under 28 U.S.C. 1291 from the denial of a writ of habeas corpus should not depend on a man's ability to pay.

II.

In any event, the court of appeals abused the discretion vested in it under 28 U.S.C. 1915 by denying petitioner leave to appeal in forma pauperis after the district court had issued a certificate of good faith. Had the petitioner been denied a certificate of probable cause by the district court, the court of appeals would have been obliged to provide the applicant with the assistance of counsel and with a record of sufficient completeness to give him full opportunity to show that the appeal is in good faith. *Coppedge* v. *United States*, 369 U.S. 438. In the course of such a proceeding at least the issues would be briefed by competent counsel and the petitioner would have the benefit of his appellate advocacy before his case was dismissed.

Much stronger is the claim of the indigent defendant for the right to proceed in forma pauperis where the trial judge who heard his case in the first instance has concluded that his appeal is not frivolous and is taken in good faith. To do as the court of appeals has done here is to circumvent this court's ruling in *Coppedge* and effectively deny petitioner an appeal on the merits and to abuse the discretion vested in the court by Congress.

ARGUMENT

I.

The Denial of Leave to Proceed in Forma Pauperis on Appeal From the District Court's Denial of a Writ of Habeas Corpus Constituted an Invidious Discrimination Against an Indigent Defendant.

The trial court pursuant to the terms of 28 U.S.C. 1915, *supra*, pp. 2-3, certified that petitioner's appeal was not frivolous and was taken in good faith. Petitioner's application to the court of appeals for leave to appeal in forma pauperis did not face the initial barrier ordinarily faced by indigent defendants of showing that the trial judge had improperly refused to certify his appeal as being in good faith. Nonetheless, the court of appeals, without appointing an attorney to represent petitioner, without granting him a transcript and without examining any legal arguments of counsel, decided that further proceedings in forma pauperis were not warranted. In effect, it denied petitioner an appeal from the judgment of the trial court. The procedure it used to reach that decision, as well as the decision itself are not warranted by the statute and are in conflict with the previous decisions of the court.

28 U.S.C. 1915 embodies two concepts. On the one hand an indigent defendant is entitled to an adequate appellate review of his conviction—a right at government expense, to present for review to an appellate court any issue not plainly frivolous. On the other hand, Congress has sought to prevent the courts from being burdened with frivolous appeals and has given district court judges the initial duty of sifting out frivolous appeals. If the trial judge certifies

that the appeal is taken in good faith, the court of appeals should simply grant the application to appeal in criminal cases in forma pauperis as a matter of course and should appoint counsel to brief and argue each case on the merits.

A. Any Procedural Device for Screening Appeals by Indigents Is Invalid If It Impinges Upon the Right of the Litigant to Equal Consideration Before the Courts.

It is now settled that a state may not deny an indigent defendant an adequate appellate review of a criminal conviction. *Griffin* v. *Illinois,* 351 U.S. 12. Such a denial was described as "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal justice." 351 U.S. p. 19. In *Griffin,* this court held that Illinois' refusal to furnish an indigent defendant with a free transcript deprived him of Fourteenth Amendment rights where a free transcript was virtually required for appellate review.

In three cases decided in the 1962 Term, *Lane* v. *Brown,* 372 U.S. 477, *Draper* v. *Washington,* 372 U.S. 487 and *Douglas* v. *California,* 372 U.S. 353, the rights of indigent defendants in state criminal cases to appointed counsel and free transcripts on appeal were notably expanded. In *Lane* v. *Brown,* the grant of transcripts by Indiana was conditioned on the request of a public defender. Since the decision of the public defender was not subject to review, it tainted the system. In *Draper* v. *Washington,* that state conditioned its grant of transcripts on the certification by the trial judge that the assignments of error were not "patently frivolous." This Court held that the Washington procedure did not afford defendants a record sufficiently

complete for appellate review and since defendants with funds received appellate review based on a full transcript, equal protection of the laws required Washington to give indigents a stenographic record "or its equivalent", 372 U.S. 497. Finally in *Douglas* v. *California,* the Court invalidated that state's procedure of sifting out appeals where counsel is required by allowing the district courts of appeal to deny counsel if after they have viewed the record, they conclude that such appointment would be of no value to either the defendant or the court.

In effect, these cases repeat the same theme—that special procedures intended to sort out frivolous appeals by indigents will survive only if they are the equivalent of the normal appellate review available to non-indigents.

B. As Applied by the Court of Appeals 28 U.S.C. 1915 Denies Indigents the Same Rights of Appeal as Are Afforded to Men of Means.

The basic statutory provision for litigation in forma pauperis in the federal courts is made by 28 U.S.C. 1915. The provisions of Sec. 1915 can be understood and applied only when read together with the other provisions of the Judicial Code and the Federal Rules governing criminal appeals. Present federal law makes an appeal from a district court in a criminal case a matter of right. 28 U.S.C. 1291. That is, a defendant has a right to have a final order of a district court reviewed by a court of appeals and need not petition that court for an exercise of its discretion to allow him to bring the case before the court. *Coppedge* v. *United States,* 369 U.S. 438.

The function of 28 U.S.C. 1915 has been described thus: ". . . [it] provides at most a device for advance screening

of appeals which, if paid, would upon motion be dismissed before argument as frivolous. The only justification for such a preliminary screening is the absence of the built-in brake upon frivolous appeals which is present in non-indigent cases. There is no other difference between paid and unpaid appeals. In both the burden of showing that the right to appeal has been abused is on the party making the suggestion." Justice Stewart, concurring in *Coppedge* v. *United States,* 369 U.S. 438 at p. 455.

This court has consistently held that 28 U.S.C. 1915 cannot be applied in a manner which would impinge upon the rights of an indigent defendant to have his fair day in court. In *Johnson* v. *United States,* 352 U.S. 565, this Court held that the district court's denial of a certificate of good faith cannot be used to bar further appeal in forma pauperis and the court of appeals must furnish one who challenges such a certificate with counsel and an adequate means of presenting the court of appeals with a fair basis for determination.

In *Ellis* v. *United States,* 356 U.S. 674, this court further refined the *Johnson* doctrine and required that appointed counsel not function as an amicus curiae but in the "role of an advocate". The court expressly held that the good faith test of the statute must not be converted into a requirement for a preliminary showing of merit. Again the theme of equality was repeated. "Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant * * * the request of an indigent for leave to appeal in forma pauperis must be allowed." 356 U.S. at p. 675.

Despite these foreshadowings, further elaboration of the applicable principles has been required. In *Coppedge* v.

United States, 369 U.S. 438, the Court sought to "indicate in somewhat greater detail than in the past, the approach a court of appeals must take toward an indigent's application for leave to take a direct appeal from his criminal conviction in forma pauperis." 369 U.S. 441. It held that the good faith requirement of 28 U.S.C. 1915 must be judged by an *objective* standard, i.e., that the issues themselves be "not clearly frivolous." Whether the issue is frivolous would in turn depend on whether at the same stage in the proceedings "the appeal would be dismissed in the case of a nonindigent litigant." 369 U.S. 447.

By this standard, the decision of the court of appeals is erroneous. Had the petitioner Nowakowski been a man of means, he would have simply filed a notice of appeal, paid the docketing fees, prepared and filed the record on appeal and his counsel would have filed a brief. Only then, after a motion to dismiss, and after consideration of an advocate's brief and probably after oral argument, would his appeal be dismissed.[1]

Herein is the true vice of the court of appeals' procedure seen. Without a full record,[2] without the benefit of appel-

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[1] Rule 11 of the Rules of the United States Court of Appeals for the Third Circuit makes applicable to criminal appeals the provisions of Rules 37 and 39 of the Federal Rules of Criminal Procedure. Rule 39(a) provides "The appellate court may at any time entertain a motion to dismiss the appeal". Rule 30 of the Court of Appeals' Rules provides that all motions shall be reduced to writing and five days notice of motion will be furnished. On the return day, fifteen minutes is allowed each side for argument. Counsel do on occasion submit their cases on memoranda without oral argument.

[2] It is significant that there was not included in the record certified to the United States Supreme Court, the transcript of the original trial. This transcript had been marked into evidence at the habeas corpus hearing (R. 62), and would appear to be the indispensable tool for determining the effectiveness of trial counsel.

late briefs and without oral argument it has finally terminated petitioner's rights to a federal appellate review of a claim of a constitutional right. The stark reality of the difference between the treatment a non-indigent gets as opposed to an indigent, may be seen on the letter of the Clerk of the Third Circuit Court addressed to petitioner on November 5, 1965, wherein he was advised that he could proceed in the court of appeals if he would send the clerk $25.00 and four copies of a motion to docket and file the record out of time. (App. 31).

How important is that right to federal appellate review was seen only last term in the case of *Sheppard* v. *Maxwell*, 384 U.S. 333, where this court reinstated the decision of a lower federal court on habeas corpus upholding a claim of deprivation of a constitutional right which had been rejected by every state court in Ohio and by this court on certiorari. One federal district judge took the time to review the *Sheppard* case. Only this month a jury in Ohio on a new trial governed by constitutional standards acquitted Doctor Sheppard.[3] He had the good fortune throughout to have his case briefed and argued by retained counsel. We can only surmise as to where he would be today if he had been an indigent.

If it be suggested that the principles and rationale of *Coppedge, Ellis* and *Johnson* apply only to direct appeals in the federal courts from federal convictions and not in cases of collateral attack under either 28 U.S.C. 2255 or 28 U.S.C. 2241 et seq., the argument should be rejected. In reviewing state court procedures, this court has held that the *Griffin* rationale applies as well to state post-conviction remedies, as to direct appeals. *Burns* v. *Ohio*, 360 U.S. 252;

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[3] New York Times, Nov. 17, 1966, p. 1.

Smith v. *Bennett,* 365 U.S. 708; *Rinaldi* v. *Yeager,* 384 U.S. 305. No less should be expected of the federal system.

Any other holding would raise a doubt as to the constitutionality of 28 U.S.C. 1915. This court has consistently relied upon its supervisory powers over the administration of federal justice to sustain its prior holdings but has always pointed out that it has been "impelled by considerations beyond the corners of 28 U.S.C. § 1915." *Coppedge* v. *United States,* 369 U.S. 438 at p. 445. In *Hardy* v. *United States,* 375 U.S. 277, 282, the court said "[w]e deal here only with the statutory scheme and do not reach a consideration of constitutional requirements." It would be a novel suggestion that less stringent requirements would be exacted under the Fifth or Sixth Amendments than the Fourteenth Amendment, although such distinctions may in some uses be made. *Reynolds* v. *Sims,* 377 U.S. 533. Nonetheless, the mandate of this court has been clear, to assure equal justice for all.

While it once may have been argued that petitioner's interpretation places an undue economic burden upon the federal government, *Hardy* v. *United States,* 375 U.S. 277, 300, it now appears that Congress is willing to bear that burden. The Criminal Justice Act of 1964[4] now provides an effective means for compensating counsel in indigent cases. The purpose of the House bill was, simply stated, "to provide legal assistance for indigent defendants in criminal cases in the courts of the United States." H.R. Rep. No. 864, 88th Cong., 1st Sess (1963). The bill provides for representation

[4] 18 U.S.C. 3006A, *infra* (App. 42).

of indigent defendants who are "financially unable to obtain counsel" and further conditions any plan upon its having "provisions for the representation on appeal of defendants financially unable to obtain representation."

While the language of the bill does not by its terms directly encompass habeas corpus proceedings brought under 28 U.S.C. 2241 et seq., no reason appears why it should not be so applied. It would apply in a 2255 proceeding since counsel is guaranteed at "every stage of the proceeding . . . through appeal." Given the legislative history of the bill and that "the time has come for a comprehensive overhauling of the procedures governing in forma pauperis appeals in the federal system", *Hardy* v. *United States*, 375 U.S. 277, 299, no less of an intent could be attributed to the Congress. See Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963).

Thus, whatever may have been the reluctance of inferior federal courts to assign counsel in collateral attack cases in the past, *Crowe* v. *United States*, 175 F.2d 799, (4th Cir. 1949) certiorari denied, 338 U.S. 950; *Tubbs* v. *United States*, 249 F.2d 37 (10th Cir. 1957), certiorari denied 355 U.S. 935; *United States* v. *Paglia*, 190 F.2d 445 (2d Cir. 1951), Comment, Right to Counsel in Federal Collateral Attack Proceedings; Section 2255, 30 U. Chi. L. Rev. 583 (1963), that reluctance should now be diminished.[5] The Congress of the United States have adopted as a national policy the message of the late President Kennedy urging

[5] Counsel acknowledges the kind assistance of Bennett Boskey, Esq. of the District of Columbia Bar and the use of materials contained in Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Min. L. Rev. 783 (1961).

upon the House the passage of the Criminal Justice Act as a means of "removing the factor of financial resources from the balance of justice." H.R. Rep. No. 864, 88th Cong., 1st Sess. (1963). It has been said that "the methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." Mr. Chief Justice Warren speaking in *Coppedge v. United States,* 369 U.S. 438, 449. Surely the nation which Providence has endowed with the greatest wealth in history can afford to give a poor man one full and fair federal review of a claim of right arising under the Constitution of the United States.

II.

The Issues Raised by Petitioner Could Not Properly Be Determined to Be Frivolous Without Further Briefing and Oral Argument, in View of the Fact That the District Court Had Already Issued a Certificate of Probable Cause.

In his petition for habeas corpus the petitioner's Amendment to Petition dated January 6, 1965, placed in issue before the district court substantially only one question, whether petitioner had been denied the effective aid and assistance of counsel guaranteed by the Sixth Amendment as made applicable by the Fourteenth Amendment to the United States Constitution.

A. The Claim of Denial by a State of the Effective Assistance of Counsel Can Properly Be Raised in a Federal Habeas Corpus Proceeding Under 28 U.S.C. 2241.

Since *Powell* v. *Alabama,* 287 U.S. 45 (1932), it has been held that where a man is entitled to counsel he is entitled

to the "effective assistance of counsel". In *Avery* v. *Alabama,* 308 U.S. 444 the Court speaking through Mr. Justice Black referred to a constitutional requirement of "due appointment of competent counsel" which "cannot be satisfied by mere formal appointment." In *White* v. *Ragen,* 324 U.S. 760 the Court held that allegations that petitioner's appointed counsel failed to confer with him until they arrived at court, failed to call a witness on his behalf and made him plead guilty, were sufficient to make a prima facie case of violation of petitioner's constitutional right to "the effective aid and assistance of counsel".

It is now settled that every state court defendant in a felony case has a constitutional right to counsel, *Gideon* v. *Wainwright,* 372 U.S. 335. There remains for determination the character and quality of representation guaranteed by the Constitution. Suffice it to say for present purposes that petitioner was entitled to the "effective assistance of counsel". It was this question which he sought to raise in a federal habeas corpus proceeding under 28 U.S.C. 2241 et seq. This use of federal habeas corpus as a procedural device for raising the issue of ineffective trial representation was not questioned. *Fay* v. *Noia,* 372 U.S. 391, *Chessman* v. *Teets,* 354 U.S. 156. The sole question was whether his counsel had been effective.

B. The Question of Effective Aid of Counsel Raised by Petitioner Was Not Frivolous Since It Was Based Upon Objective Factors Not a Matter of Trial Tactics.

While the question may be simply stated, it is not simply answered. Most of the claims of ineffective counsel turn upon arguments that counsel used poor judgment or poor tactics in the course of a trial. "As lawyers we are not

unaware of the general tendency of unsuccessful litigants to blame their counsel for their misfortune". *Desmond* v. *United States,* 333 F.2d 378, 381, 382 (1st Cir. 1964). While no single word or group of words can furnish an exact formula for decision, certain objective criteria have developed whereby such claims may be judged.

A case by case analysis has been made of the various factors which alone, or in combination will impel the conclusion that counsel has been ineffective. *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases,* 59 Northwestern Univ. L. Rev. 289 (1964). Among the factors to be considered are:

1. Youth and inexperience of trial defense counsel contributed to the errors set forth below.

While the mere fact that counsel is young and inexperienced does not of itself furnish grounds for post-conviction relief it is undoubtedly a factor to be considered. *Spaulding* v. *United States,* 279 F2d. 65 (9th Cir. 1959), certiorari denied, 364 U.S. 887, *People* v. *Riley,* 376 Ill. 364, 33 N. E. 2d 872, certiorari denied 313 U.S. 586, *McKenna* v. *Ellis,* 280 F2d 592 (5th Cir. 1960). In the case at bar, petitioner's court appointed counsel stated that he had never tried a civil jury trial (R. 74) and was uncertain as to whether he had ever tried a criminal jury trial. (R. 74) While this does not necessarily reflect on the court appointed counsel's efforts, it surely had an effect on his ability to handle the difficult evidentiary questions raised at the trial. Some of the trial errors alleged in the habeas corpus proceeding were:

(a) *Failure to object to the state's impeachment of its own witness.*

The principal witness for the state was the alleged accomplice, Douglas Smith. When he was put on the stand he denied any participation in the crime and exculpated the petitioner Nowakowski (R. 61). Thereupon, without objection, he was permitted to be removed from the court room and taken into an adjoining court room and was later returned to the stand and invoked the privilege against self-incrimination. (R. 64). He was thereupon impeached by the State. (R. 66, 67). No objection was made by court appointed counsel to these bizarre proceedings. Indeed, "[t]here was not one objection in the whole trial record." (R. 72)

Under Pennsylvania law, the State had no inherent right to impeach its own witness. Impeachment is within the discretion of the trial judge. A proper groundwork must be laid and before impeachment is allowed, the party calling the witness must first show (1) That he has been genuinely surprised (2) that he had a right to rely on the prior statement and (3) that he had some kind of representation by the witness so that he was induced to call him. *Commonwealth* v. *Smith,* 178 Pa.Super. 251, 115 A.2d 782 (1955); *Selden* v. *Metropolitan Life Ins. Co.,* 157 Pa. Super. 500, 43 A.2d 571 (1945).

Until such a foundation had been laid, defense counsel could have properly objected to the impeachment of the State's witness and to the unusual conduct concerning the conference between the court and Smith's counsel (R. 61), especially in view of the fact that Smith had already pleaded guilty and was awaiting sentence. (R. 61). Subsequently,

Smith was convicted of perjury and sentenced therefor to two to five years. The question is when did he perjure himself—before the Alderman's Court or before the County Court.

(b) *Failure to request cautionary instructions as to the witnesses who impeached Smith.*

Even if the trial court was correct in allowing the impeachment of Smith, the best the State could do thereafter was to neutralize his testimony. It is the settled law of Pennsylvania, that if impeachment of a hostile witness is allowed, the evidence of prior inconsistent statements is only admissible for the purpose of impeaching the witness, that is to indicate to the jury that his present testimony should be disbelieved because he has told prior conflicting stories. Its purpose is not affirmative proof of the facts set forth in the prior statement. *Commonwealth* v. *Turza*, 340 Pa. 128, 16 A.2d 401 (1940); *Commonwealth* v. *Smith*, 178 Pa. Super. 251, 115 A.2d 782 (1955). Despite this, two police officers were permitted to testify without objection as to the prior statement of Smith incriminating petitioner. (R. 72). Not only was no objection then made but no request was made for instructions limiting their testimony to impeachment purposes (R. 72). The net result was that the only direct evidence of petitioner's guilt was obtained by using the inadmissible testimony of the police officers.

It can be said with safety that petitioner's trial counsel was candid. The colloquy at the habeas corpus hearing was:

> "Q. If the testimony of Officer Tribble was for impeachment purposes, was not it reversible error for the Judge not to instruct upon it?

A. I have no recollection of the testimony. Also, I wouldn't know." (R. 67)

The same point had been raised and lost in *Commonwealth* v. *Smith,* 178 Pa. Super. 251, 115 A.2d 782 (1955), when defense counsel failed to raise it. The court said "since he failed to object, and in fact consented to the introduction, without any explanation, the question is academic here." 115 A.2d 786. If appointed counsel had been familiar with *Commonwealth* v. *Smith,* he might have gotten a directed verdict for petitioner.

(c) *Failure to request special instructions as to a conviction based on the testimony of an accomplice.*

While the record before us does not contain the transcript of the trial judge's charge, no reference appears to have been made at the trial as to the need for corroboration of the Smith testimony. One who testifies while faced with criminal charges as Smith was in the Alderman's Court may be influenced to testify falsely by the hope of leniency and the defendant is entitled to have the jury so advised. *Commonwealth* v. *Brown,* 158 Pa. Super. 226, 44 A.2d 524 (1945). In addition to the need for scanning an accomplice's testimony, corroboration is required. Ordinarily the exact form of instruction should be left to the trial judge, *Commonwealth* v. *McKenna,* 206 Pa. Super. 317, 213 A.2d 223 (1965), but an instruction should be given.

(d) *Failure to advise about the privilege against self-incrimination.*

While it is no doubt true that petitioner would have had to take the stand at trial since his defense was an alibi, at

least petitioner should have been advised not to volunteer that "he was an ex-convict and on parole". (R. 68) The practice in Pennsylvania is that if a defendant takes the stand in his own defense, the Commonwealth may offer evidence of prior convictions and guilty pleas to affect credibility. The proper practice is to have the prosecutor read into evidence the original bills of indictment, guilty pleas and convictions. *Commonwealth* v. *Johnson*, 206 Pa. Super. 147, 211 A.2d 100 (1965); *Commonwealth* v. *Butler*, 405 Pa. 36, 173 A.2d 468 (1961). There was surely no need for petitioner to say he was on parole even if assigned counsel thought it prudent to disclose his record on direct examination.

(e) *Failure to object to evidence of an offer of compromise.*

At the criminal trial, the proprietor of the Green Garden Tavern was permitted to testify without objection to the receipt of a letter from petitioner wherein he offered without prejudice to pay for the damages sustained at the Tavern (R. 63). While no Pennsylvania case has been disclosed bearing directly on the admissibility of such a letter in a criminal case, every practicing lawyer is familiar with the general proposition that an offer to compromise a dispute is not admissible in evidence to prove that the sum offered was admitted to be due. *Mannella* v. *City of Pittsburgh*, 334 Pa. 396, 6 A.2d 70 (1939). Especially is this so where the offer is expressly stated to be "without prejudice". *Jones* v. *Steinberg*, 178 Pa. Super. 517, 115 A.2d 803 (1955); *Rankin* v. *Phillippe*, 206 Pa. Super. 27, 211 A.2d 56 (1965).

A fortiori, assigned counsel should have objected to the offering of evidence of this compromise. It appeared that

in the same letter petitioner "stated he was not guilty of it, but he wanted to avoid going to trial, so forth." (R. 63). Every lawyer has, at some time, suggested a like offer to a client faced with compromising circumstances. That should not be turned into an admission of guilt.

Concededly, none of the foregoing trial decisions by assigned counsel would justify a reversal [redacted] together they form a picture of inexperience that may have been detrimental to petitioner.

2. Inadequate Pretrial Investigation as a result of delayed appointment of counsel precluded the effective assistance of counsel.

Whatever may be the reluctance of courts to make a value judgment as to the intrinsic effectiveness of trial counsel, they have been quick to vindicate a claim of denial of the effective assistance of counsel where it is shown that the appointment came so late as to preclude an adequate pretrial investigation. Chief Judge Biggs of the Third Circuit whose decision we are reviewing has made this point amply clear. In *United States* v. *Helwig*, 159 F.2d 616 (3rd Cir. 1947), where the clerk's minutes indicated that counsel was appointed only a minute before trial, he said:

"We are of the opinion that counsel for an indigent defendant held in custody, must be appointed by the court sufficiently far in advance of trial to enable counsel adequately to prepare the defense." 159 F.2d 616, 618. In *United States* v. *Vasilich*, 206 F. Supp. 195 (M.D. Pa. 1962) counsel had been appointed at 1:30 and the trial commenced at 2:00 over counsel's objection. The charge was robbery and the defenses alibi and mistaken identity. Vasilich was awarded a new trial 20 years after his original trial.

While those were extreme cases, the principle is sound. Here the petitioner swears that he never saw his assigned counsel until the morning of the trial (R. 85), and assigned counsel thinks he only saw his client before that because he had a note in his diary. (R. 75). However, the official court records (App. 33) disclose that counsel was assigned to the co-defendant Smith on August 29, 1957 but there is no order of court ever appointing counsel for Nowakowski. Also, petitioner's court appointed counsel did not enter his appearance until the very day of the trial. A copy of the actual appearance is found in the Appendix to Petitioner's Brief. (App. 32)

Powell v. *Alabama,* 287 U.S. 45 early held that effective representation requires adequate consultation and investigation. *Cf. Glasser* v. *United States,* 315 U.S. 60. In the case at bar petitioner's assigned counsel admitted freely that he had not interviewed or attempted to interview the police officer who investigated the case (R. 62), had not discussed the case with the prosecution witnesses (R. 62) (it is questionable if he could have done this), had not examined the pretrial statement of Smith (R. 65), had not interviewed his client's alibi witness (R. 65) and had not asked the Sheriff's office of Erie County to serve a subpoena on the alibi witness until the end of the first day of trial. (R. 70). He did say that he had spoken to her on the telephone but did not elaborate on the conversation (R. 70).

Taken in the whole this was not adequate preparation for the trial of a felony case. This point is urged without criticism of assigned counsel since it is apparent that the limitations on his ability were imposed by the circumstances of his late appointment. These limitations were particularly striking in this case because the presence of the alibi wit-

ness was so important. The irony of the case is that this same witness was not produced again at the habeas corpus hearing because of a mixup in the subpoena (R. 90). Just once, it would be interesting to hear her testimony.

In view of these serious questions as to the effectiveness of trial counsel, it cannot fairly be said that the questions raised by petitioner were frivolous. They may not eventually be sustained but surely he deserves the right to be heard on them.

C. Since the District Court Had Already Issued a Certificate of Good Faith, the Court of Appeals Should Have Granted Petitioner Leave to Appeal in Forma Pauperis as a Matter of Right.

The disturbing aspect of this case is the manner in which the court of appeals summarily disregarded the trial judge's certificate of good faith. Section 1915 of Title 28 U.S.C. authorizes the prosecution *inter alia* of an appeal by an indigent person without prepayment of costs or fees. The only condition is that an "appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." On motion of petitioner, the trial judge certified that the petitioner "has probable cause for appeal." (R. 129). In the converse situation where the trial judge's certificate is unfavorable this Court has said that the "District Court's certificate is not conclusive although it is, of course, entitled to weight", *Coppedge* v. *United States,* 369 U. S. 438, 446; *Johnson* v. *United States,* 352 U.S. 565. In such cases this court has held that a petitioner who contests a certificate is entitled to counsel. Surely an indigent petitioner is no less entitled to counsel to sustain a certificate of probable cause. By a process of inverse

logic, the court of appeals has simplified the procedure for handling indigent appeals. This court should not permit *Coppedge* to be thus vitiated.

Because the issue of ineffective counsel was properly raised in the habeas corpus proceeding and because the issues were genuine and not frivolous as to the experience, ability and pretrial preparation of assigned counsel and because the very trial judge who had entertained the habeas corpus hearing found there was probable cause for the appeal, the court of appeals abused its discretion in denying petitioner leave to appeal in forma pauperis without affording him the right to be heard with the aid of counsel.

Conclusion

For the reasons stated the orders of the court of appeals should be reversed and the case remanded to that court with instructions that petitioner be given leave to appeal in forma pauperis, be given a record of sufficient completeness to enable him to perfect his appeal and be assigned counsel in that court to assist him in presenting the case to the court.

Respectfully submitted,

DANIEL J. O'HERN
Attorney for Petitioner

November, 1966.

APPENDIX

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
U. S. COURTHOUSE
PHILADELPHIA 19107

IDA O. CRESKOFF
CLERK

TELEPHONE
215-597-2995

November 5, 1965

Edward J. Nowakowski, No. C-7409
State Correctional Institution
P. O. Box 9901
Pittsburgh, Pa. 15233

Re: U.S. ex rel. Nowakowski, petitioner,
vs. Maroney, Supt., etc.
C. A. Misc. Record No. 199

Dear Sir:

This will acknowledge receipt of your letter of November 1, 1965.

By order of July 27, 1965 the Court of Appeals denied your petition to prosecute your appeal in forma pauperis. By order of October 4, 1965 the Court denied your motion for reconsideration.

You may choose either of the following alternatives:

(1) Send this office the Clerk's fees of $25.00, together with 4 copies of a motion to docket the appeal and file the record out of time, or

(2) Petition the Supreme Court of the United States for a writ of certiorari.

If you choose (2) advise this office and we will then let you know what the cost will be to certify the proceedings in this court to file with your petition for writ of certiorari in the Supreme Court.

Very truly yours,

Clerk

fm

Clerk of Courts Form No. 5

IN THE COURT OF QUARTER SESSIONS
OF ERIE COUNTY, PENNSYLVANIA
No. 10 SEPTEMBER Sessions, 1957

COMMONWEALTH

vs.

EDWARD JOHN NOWAKOWSKI

I Appear for Defendant, EDWARD JOHN NOWAKOWSKI, in above stated case.

/s/ THOMAS C. MANGAN
Att'y for Defendant

To GEORGE L. WILSON, Clerk of Courts
Dated SEPTEMBER 11th, 1957

IN THE COURT OF QUARTER SESSIONS AND OYER AND TERMINER IN AND FOR THE COUNTY OF ERIE, PENNSYLVANIA

No. 10 SEPTEMBER SESSIONS, 1957.

COMMONWEALTH OF PENNSYLVANIA

VS.

JOSEPH CORCORAN,
DOUGLAS E. SMITH,
EDWARD JOHN NOWAKOWSKI.

QUARTER SESSIONS DOCKET ENTRIES

1st Count: BURGLARY.
2nd Count: LARCENY.
3rd Count: RECEIVING STOLEN GOODS.

C. A. TRIBBLE, PROS.
JAIL

Upon Petition of Henry Corcoran, the Father of Joseph Corcoran, the Minor Defendant above-named, by his counsel, Edward G. Petrillo, Esquire, asking the Court to fix Bail for the said Defendant, Joseph Corcoran, the following Order of Court was made:

AND NOW, to-wit, this 18th day of July, 1957, Bail in the above-entitled case is fixed in the amount of $1,000.00.

Per Curiam Laub, Judge.

July 18th, 1957, Bond of the Defendant, Joseph Corcoran, in the sum of One Thousand ($1,000.00) Dollars with Henry Corcoran as surety for appearance on the Second Monday of September, 1957, filed showing the following Order of Court:

July 18th, 1957, Bond Approved.

Burton R. Laub, JUDGE.

August 28th, 1957, A True Bill.

And now, to-wit, the 29th day of August, 1957, comes Herbert J. Johnson, Jr., District Attorney, who has been informed that the above named defendant is indigent, and respectfully requests your Honorable Court to appoint counsel to represent the said defendant. The above stated indigent defendant is charged with the crime of Burglary.

(Signed) Herbert J. Johnson, Jr.
District Attorney

And now, to-wit, the 29th day of August, 1957, motion granted and Walter A. Dart, Jr., Esq., is hereby appointed as counsel for the defendant in the above-entitled case.

Samuel Y. Rossiter
J.

(The Above Motion and Order Applies to the Defendant, Douglas E. Smith)

September 10th, 1957, Certified into the Court of Oyer and Terminer as to Douglas E. Smith.

September 11th, 1957, Certified into the Court of Oyer and Terminer as to Edward John Nowakowski.

(See Oyer and Terminer Docket No. 8—Page 271)

Oyer and Terminer Docket Entries

August 28th, 1957, A True Bill.

September 10th, 1957, Certified into the Court of Oyer and Terminer as to Douglas E. Smith.

September 10th, 1957, the Defendant, Douglas E. Smith, appears in Court with his Counsel, Walter A. Dart.

September 10th, 1957, Appearance for the Defendant, Douglas E. Smith, filed by Walter A. Dart, Attorney.

And now, to-wit: Sept. 10 A.D. 1957 the Defendant Douglas Smith being arraigned, plead Guilty, before,

Elmer L. Evans, President Judge.

And Now, September 10th, 1957, Sentence as to the Defendant, Douglas E. Smith, is deferred until Monday, September 16th, 1957, at 10:00 o'clock A.M. and said Defendant is remanded to the Jail of Erie County.

Elmer L. Evans, President Judge

September 11th, 1957, Certified into the Court of Oyer and Terminer as to Edward John Nowakowski.

September 11th, 1957, the Defendant, Edward John Nowakowski, appears in Court with his Counsel, Thomas C. Mangan.

September 11th, 1957, Appearance for the Defendant, Edward John Nowakowski, filed by Thomas C. Mangan, Attorney.

September 11th, 1957, Case called, Honorable Samuel Y. Rossiter, Judge, on the Bench, and the Defendant, Edward John Nowakowski, present in Court with his Counsel, Thomas C. Mangan. The Defendant, Edward John Nowakowski, being arraigned, pleaded Not Guilty; same day, the Defendant, Edward John Nowakawski, consulted and assisted his Counsel in selecting the following Jury: George J. Winnen, Earl Martin, Frank J. Stroker, Mrs. Marie Barron, Martin L. Connell, Joseph D. Pault, Carl R. King, James Cooper, Mildred M. Auerbach, Harold Cotton, Joseph Zipper and Kathryn Graves. The selection of the Jury having been completed, the Jury was sworn and the case assigned to Honorable Samuel J. Roberts, President Judge, Orphans' Court, Specially Presiding, for trial.

September 11th, 1957, Case called for trial with Honorable Samuel J. Roberts, President Judge, Orphans' Court, Specially Presiding, on the Bench, and the Defendant, Edward John Nowakowski, present in Court with his Counsel, Thomas C. Mangan.

September 12th, 1957, the Defendant, Edward John Nowakowski, being present in Court with his Counsel, Thomas C. Mangan, and having been present during the

entire proceedings of the trial, the Jury say They Find the Defendant Edward John Nowakowski Guilty.

September 12th, 1957, Thomas C. Mangan, Attorney for the Defendant, Edward John Nowakowski, requesting that the Jury be polled and the Jury being severally called, severally say, that they find the Defendant, Edward John Nowakowski, Guilty.

And Now, September 12th, 1957, After verdict, sentence as to the Defendant, Edward John Nowakowski, is deferred until Monday, September 16th, 1957, and said Defendant is remanded to the Jail of Erie County.

Samuel J. Roberts, President Judge,
Orphans' Court, Specially Presiding

September 16th, 1957, the Defendant, Edward John Nowakowski, appears in Court with his Counsel, Thomas C. Mangan.

And now, September 16th, 1957, the Court sentences the defendant Edward John Nowakowski to pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in a state institution, for an indefinite term, the minimum of which shall be Three (3) Years, and the maximum Seven (7) Years, to be computed from the date of commitment, to-wit: July 14th, 1957, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

The defendant, Edward John Nowakowski, is ordered committed to the Western Correctional Diagnostic and Classification Center at the Western Penitentiary, Allegheny County, Pennsylvania, for compliance with the above sentence.

Samuel J. Roberts, President Judge,
Orphans' Court, Specially Presiding

September 23rd, 1957, Testimony filed.

September 23rd, 1957, Certified copy of the Testimony given to John L. Coates, Sheriff, for delivery by him to the WESTERN CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER at the Western Penitentiary.

November 20th, 1957, the Defendant, Douglas E. Smith, appears in Court with his Counsel, Walter A. Dart.

And now, November 20th, 1957, the Court sentences the defendant, Douglas E. Smith, to pay a fine of One Hundred ($100.00) dollars, to the Commonwealth, (for the use of the County of Erie), pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in a state institution, for an indefinite term, the minimum of which shall be Three (3) Years and the maximum Eight (8) Years, to be computed from the date of commitment, to-wit: July 14th, 1957, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

The defendant, Douglas E. Smith, is ordered committed to the WESTERN CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER at the Western Penitentiary, Allegheny County, Pennsylvania, for compliance with the above sentence.

Elmer L. Evans, PRESIDENT JUDGE.

March 26th, 1958, Petition For Forma Pauperis requesting records filed by the defendant, Edward John Nowakowski.

ORDER

And now, to wit, March 25, 1958, pursuant to the within petition, the Clerk of Courts is directed to forward to the defendant copies of such of the papers requested as are on file in his office, with the exception of the testimony which perhaps can be made available to the defendant by the

Warden of the Penitentiary. The papers shall be supplied at the expense of the County.

Samuel J. Roberts, P.J.
Orphans' Court, Specially Presiding.

April 1st, 1958, Mailed to Edward John Nowakowski at the Western Penitentiary, Certified copy of the Docket Entries, Indictment, Appearance of Attorney, Verdict of the Jury, Order of September 12, 1957 and Sentence of the Court in this case.

MOTION IN ARREST OF JUDGMENT

To; The Honorable the Judges of said Court:

Comes now the Defendant, Edward Nowakowski, who respectfully represents the following:

1. On Sept. 12, 1957 the defendant was convicted of Burglary, Larceny and Receiving Stolen Goods and sentenced to serve 3 to 7 years at the Western State Penitentiary. 2. Defendant had a court appointed attorney who was so overawed, inexperienced or incompetent that he failed to properly represent petitioner and failed to prepare and present his defense at trial. 3. The legally competent evidence presented was not sufficient to permit the case to go to the jury. 4. The verdict of the jury was contrary to the weight of the evidence and is inconsistent. Wherefore, the defendant Edward Nowakowski, respectfully prays your Honorable Court to grant this Motion in Arrest of Judgment and he will ever pray.

(SIGNED) Edward John Nowakowski
PETITIONER

MOTION FOR NEW TRIAL

To: The Honorable, the Judges of the said Court:

Comes now the Defendant, Edward Nowakowski, who respectfully represents the following:

1. Paragraphs 1 through 4 of the aforesaid motion in Arrest of Judgment are incorporated by reference herein. 5. The defendant did not receive a reasonable time to prepare his defense, an opportunity to subpoena witnesses, nor counsel able, willing and competent to undertake and prepare his defense. 6. One of the Commonwealth's witnesses was permitted to converse with the jury during the course of the trial. 7. The Court failed to comment on defendant counsel's handling of the case or to note the jury that Commonwealth's case rested solely on hearsay, legally incompetent, evidence. 8. The Court when co-defendant repudiated his statement on the stand and absolved the defendant, granted a recess and permitted the Commonwealth to remove the said defendant from the courtroom before his testimony on direct examination was completed. Wherefore your petitioner Edward Nowakowski, the defendant, respectfully prays that your Honorable Courts grant this motion for a new trial.

(SIGNED) Edward John Nowakowski
PETITIONER

Affidavit of Forma Pauperis filed by Edward John Nowakowski, Petitioner, attached to Motion for Arrest of Judgment and Motion for New Trial and filed.

ORDER

And now, to wit, November 13, 1959, the motion in arrest of judgment and the motion for new trial are refused.

Samuel J. Roberts, P. J.
Orphans' Court, Specially Presiding.

November 16th, 1959, Copy of Order of November 13, 1959, mailed to Edward John Nowakowski at the Western Penitentiary, Pittsburgh 33, Penna.

Clerk of Courts Form No. 7

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF ERIE, *ss.*

I, GEORGE L. WILSON, Clerk of the Court of Quarter Sessions and Oyer and Terminer in and for the County of Erie, Commonwealth of Pennsylvania, do hereby certify that the foregoing is a true photostatic copy of the Appearance of Counsel and Docket Entries in the case of the COMMONWEALTH OF PENNSYLVANIA VS. EDWARD JOHN NOWAKOWSKI as appears by the record in my office in said case, No. 10 SEPTEMBER Sessions, 1957.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court at Erie, this 1st day of June A. D. 1965.

/s/ GEORGE L. WILSON
Clerk of Court of Quarter Sessions
and Oyer and Terminer

(Seal)

(Emblem)

GEORGE L. WILSON
CLERK OF COURTS
ERIE, PA.

October 24, 1958

Mr. Edward Nowakowski No. C-3955
P. O. Box 9901
Pittsburgh 33, Pennsylvania

Dear Mr. Nowakowski:

Douglas E. Smith pleaded Guilty to a charge of Perjury under Indictment No. 135 November Sessions, 1957.

This charge was brought against him because of the fact that he testified under oath during the trial at No. 10 September Sessions, 1957, in the Court of Oyer and Terminer that they, the said Douglas E. Smith and Edward John Nowakowski, had not burglarized one Green Garden Tavern at 8th and Greengarden, in the City of Erie, County of Erie and State of Pennsylvania on or about the 13th day of July, 1957, whereas, in truth and fact, he, the said Douglas E. Smith had previously on the 18th day of July, 1957, testified under oath in a judicial proceeding before Alderman Michael J. Kinecki of the Second Ward of the City of Erie, that they, the said Douglas E. Smith and Edward John Nowakowski, had burglarized the said Green Garden Tavern on or about the 13th day of July, 1957.

On November 20th, 1957, Douglas E. Smith was sentenced under this charge of Perjury to serve Two (2) Years to Five (5) Years in a state institution, said sentence to run consecutively with the sentence imposed under No. 10, September Sessions, 1957.

Very truly yours,

/s/ GEORGE L. WILSON
George L. Wilson
Clerk of Courts

GLW/ebw

The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. 3006A provides:

§ 3006A. Adequate representation of defendants

(a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for defendants charged with felonies or misdemeanors, other than petty offenses as defined in section 1 of this title, who are financially unable to obtain an adequate defense. Representation under each plan shall include counsel and investigative, expert, and other services necessary to an adequate defense. The provision for counsel under each plan shall conform to one of the following:

(1) Representation by private attorneys;

(2) Representation by attorneys furnished by a bar association or a legal aid agency; or

(3) Representation according to a plan containing a combination of the foregoing.

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for the representation on appeal of defendants financially unable to obtain representation. Consistent with the provisions of this section, the district court may modify a plan at any time with the approval of the judicial council of the circuit; it shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of modifications in its plan.

(b) Appointment of counsel.—In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent

him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States commissioner or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States commissioner or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

(c) Duration and substitution of appointments.—A defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner or court through appeal. If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the representation, he may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he had retained, the court may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States commissioner or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation.—An attorney appointed pursuant to this section, or a bar association or legal aid agency which made an attorney available for appointment, shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $15 per hour for time expended in court or before a United

States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred. A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States commissioner or that court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States commissioner or court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney, bar association or legal aid agency. For representation of a defendant before the United States commissioner and the district court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall not exceed $500 in a case in which one or more felonies are charged, and $300 in a case in which only misdemeanors are charged. In extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the chief judge of the circuit. For representation of a defendant in an appellate court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall in no event exceed $500 in a felony case and $300 in a case involving only misdemeanors. * * *